

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WESTERN NEW YORK	:	
FLYING CLUB, INC.	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 1982	:	
through February 29, 1988.	:	

Petitioner, Western New York Flying Club, Inc., P.O. Box 9, 56 Doris Avenue, Lancaster, New York 14086, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1982 through February 29, 1988 (File No. 806926).

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 462 Washington Street, Buffalo, New York, on January 10, 1990 at 9:15 A.M. Petitioner appeared by Salvatore J. Messina, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether petitioner's request for a conciliation conference was timely filed.

FINDINGS OF FACT

On October 4, 1988, the Division of Taxation issued to petitioner, Western New York Flying Club, Inc., three notices of determination and demands for payment of sales and use taxes due which, together, assessed a total of \$14,913.05 in tax due, plus penalty and interest, for the period December 1, 1982 through February 29, 1988.

On January 12, 1989, the Division's Bureau of Conciliation and Mediation Services received a request for a conciliation conference in response to the three notices referred to above. The envelope containing said request bore a United States Postal Service postmark of

January 9, 1989. The request was mailed to the Division via first class U.S. mail. The request itself, along with a cover letter enclosed therewith, was dated December 19, 1988. Both the request and cover letter bore the signature of Salvatore J. Messina, petitioner's representative.

On February 24, 1989, the Bureau of Conciliation and Mediation Services issued an order dismissing petitioner's request as untimely.

SUMMARY OF PETITIONER'S POSITION

Petitioner contended that the request for a conciliation conference was mailed on December 19, 1988. Petitioner's representative testified that he prepared the request on December 19, 1988 after discussing the merits of the assessment with petitioner's accountant on December 18. Petitioner's representative also testified that he personally stamped and mailed the request by depositing the envelope in a U.S. Postal Service box in the lobby of the Liberty Bank Building in Buffalo, New York, on December 19, 1988. Petitioner's representative further testified that he clearly recalled mailing the request on December 19, 1988 because that date was his birthday.

CONCLUSIONS OF LAW

A. A petition for a hearing before the Division of Tax Appeals must be filed within 90 days of the date of a notice of determination (Tax Law § 1138[a][1]). This time is suspended, however (Tax Law § 170[3-a][b]), if petitioner files a request for a conciliation conference under Tax Law § 170(3-a). This request must itself be filed within 90 days of the date of the notice of determination and there can be no extension of this time limitation (20 NYCRR 4000.3[c]).

B. The dispositive fact in the instant matter is that the envelope containing petitioner's request for a conciliation conference bore a United States postmark of January 9, 1989, a date which fell beyond the 90-day limitation period with respect to the notices of determination herein. When the United States Postal Service is used to effect delivery, the date of the postmark as made by the United States Postal Service shall be deemed the date of delivery (see Matter of Donald Davidson, Tax Appeals Tribunal, March 23, 1989). Here, the envelope

containing petitioner's request was postmarked outside the 90-day period. Petitioner's request was therefore untimely. Moreover, even if petitioner had established as fact herein his contention that the request was deposited in the mail on December 19, 1988, the result herein would be unchanged. Where a taxpayer uses the U.S. Postal Service to file a petition or request for a conciliation conference, that taxpayer bears the risk of loss or delay in transmitting the document (see 20 NYCRR 535.1[b][1][iii]; 3000.16[a][2][iii]). It is noted that the use of certified or registered mail obviates this risk (see 20 NYCRR 3000.16[c]; 535.1[b][3]). Accordingly, the Division properly denied petitioner's request for a conciliation conference as untimely.

C. The petition of Western New York Flying Club, Inc. is dismissed.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE